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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

HCL PARTNERS LIMITED PARTNERSHIP, On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, DEAN M. LUVISA, AMIN I. KHALIFA and PRICEWATERHOUSECOOPERS, LLP, Defendants.	**ECF CASE** **No. 07-CV-2245-BTM-NLS** Date: March 28, 2008, 2008 Time: 11:00 A.M. Courtroom: 15 (5th Floor) Per Chambers No Oral Argument Unless Requested by the Court

THE NEW JERSEY CARPENTERS PENSION AND BENEFIT FUNDS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF WESTCHESTER CAPITAL MANAGEMENT AND GREEN & SMITH INVESTMENT MANAGEMENT FOR APPOINTMENT OF LEAD PLAINTIFF AND APPROVAL OF LEAD COUNSEL

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INTRODUCTION

The New Jersey Carpenters Pension and Benefit Funds (the "Carpenters Funds") respectfully submit this memorandum of law (a) in opposition to the competing motion for appointment of lead plaintiff and approval of lead counsel filed by Westchester Capital Management, Inc. ("Westchester") and Green & Smith Investment Management, LLC ("Green & Smith") (collectively, the "Investment Advisors") and (b) in further support of their motion for consolidation, appointment of the Carpenters Funds as lead plaintiff and approval of Schoengold Sporn Laitman & Lometti, P.C. ("SSLL") as lead counsel and Glancy Binkow & Goldberg LLP ("GBG") as liaison counsel.[1]

As explained more fully below, the Investment Advisors' motion should be denied for several reasons:

- As a matter of law, the Investment Advisors lack standing to sue in this case;
- The Investment Advisors have failed to show that they have the requisite authority to serve as lead plaintiff herein;
- As merger arbitrageurs, the Investment Advisors' clients are atypical and subject to unique defenses;
- The Investment Advisors' financial interest in the relief sought by the class is overstated; and
- The certification filed by the Investment Advisors is deficient.

As a result, the Carpenters Funds should be appointed lead plaintiff, and their choice of counsel should be approved.

[1] A third competing motion, filed by Alaska Electrical Pension Fund and Genesee Country Employees' Retirement System, was withdrawn on January 30, 2008. A fourth motion, filed by Louisiana Municipal Police Employees' Retirement System, was withdrawn on March 7, 2008. As a result, this memorandum does not address those motions.

ARGUMENT

POINT I

THE INVESTMENT ADVISORS LACK STANDING TO SUE

A. The Investment Advisors Lack Article III Standing

It is axiomatic that in order for a litigant to invoke this Court's jurisdiction, he or she must present a justiciable "Case[]" or "Controvers[y]." U.S. Const. Art. III, § 2, cl. 1; *see also*, *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1856 (2006). When a litigant suffers no personal injury fairly traceable to the defendant's unlawful conduct, the alleged circumstances do not give rise to an Article III case or controversy. *Id.* Indeed, even "[a]t the pleading stage" a plaintiff must set forth some "general factual allegations of injury resulting from the defendant's conduct." *Lewis v. Casey*, 518 U.S. 343, 358 (1996); *see also*, *Global Crossing Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 207 (S.D.N.Y. 2003) ("a plaintiff seeking to represent a class must be a member of the class he purports to represent. Thus, it is not enough that plaintiffs seek damages only for a class that has standing; at least one named plaintiff must be a member of that class") (internal citations omitted); *In re Scudder Mut. Funds Fee Litig.*, Civ. No. 04-1921, 2007 U.S. Dist. LEXIS 59643, at *33 (S.D.N.Y. Aug. 14, 2007) ("there is no case or controversy between Named Plaintiffs and Defendants as to the fees charged to Funds in which Named Plaintiffs own no shares.")

In the context of an investment advisor seeking to represent a class of shareholders in a securities class action, the court in *In re Tyco Int'l, Ltd.*, 236 F.R.D. 62, 73 (D.N.H. 2006) observed:

> The United States Supreme Court has repeatedly recognized that [i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.

> *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); *see also Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004); *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L Ed. 2d 343 (1975). Three requirements must be met to warrant an exception to the general rule: '[t]he litigant must have suffered an 'injury in fact' thus giving him or her a 'sufficient concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interest.' *Powers*, 499 U.S. at 411 (citations omitted). Injury in fact is an 'irreducible constitutional minimum' aspect of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Moreover, it requires an actual injury to the litigant that is before the court. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771, 120 Ct. 1858, 146 L. Ed. 2d 836 (2000).

In *Tyco*, the court held that an investment advisor cannot satisfy the injury-in-fact requirement. *Id.*, at 73.

Here, the Investment Advisors admit that they did not purchase any Leap securities for their own account or suffer any compensable loss themselves as a result of defendants' alleged misrepresentations and omissions. Therefore, the Investment Advisors have no standing to sue on behalf of their clients or the Class.

B. The Investment Advisors Do Not Have Standing Under Rule 10b-5

The Supreme Court has held that Rule 10b-5 plaintiffs must be actual purchasers or sellers of securities. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-31 (1975); *see also, Harmsen v. Smith*, 693 F.2d 932, 941 (9th Cir. 1982).

Numerous courts have held that an investment advisor, because it does not purchase shares for its own account and therefore does not suffer a compensable loss, does not have standing to sue on behalf of its clients or the class. *See, e.g., Weisz v. Calpine Corp.*, Civ. No. 02-1200, 2002 U.S. Dist. LEXIS 27831, at *21-22 (N.D. Cal. Aug. 19, 2002) (denying motion for leadership where movant investment advisor failed to provide evidence that it purchased shares for its own account); *In re Peregrine Sys. Sec. Litig.*, Civ. No. 02-870, 2002 U.S. Dist.

LEXIS 27690, at *56-57 (S.D. Cal. Oct. 11, 2002) (rejecting investment advisor as lead plaintiff where movant failed to provide evidence, other than its own statement, that it was authorized to act on behalf of clients); *In re Bank One Shareholders Class Actions*, 96 F. Supp. 2d 780, 784 (N.D. Ill. 2000) (institutional investment manager not "most adequate" plaintiff in part because it was "not a buyer for its own account, standing instead in the place of whatever number of investors are participants in the managed fund."); *In re Tyco Int'l*, 236 F.R.D. at 72 (refusing to certify investment advisor as class representative where advisor itself did not suffer any injury); *In re Cardinal Health, Inc., Sec. Litig.*, 226 F.R.D. 298, 311 (S.D. Ohio 2005) (observing that an investment advisor "will be subject to a unique defense regarding its standing to assert securities fraud claims on behalf of its clients because it has no proof that it is the clients' attorney-in-fact"); *Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 634-35 (D.N.J. 2002) (denying motion for leadership where investment advisor did not demonstrate that it acted as attorney-in-fact for its clients and was authorized to bring suit to recover for investment losses); *In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 209 F.R.D. 353, 358 (S.D.N.Y. 2002) (investment advisor rejected as class representative where it did not purchase shares of stock for its own account); *In re Espeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 98 (S.D.N.Y. 2005) (even if movant was an investment advisor to his family, who actually bought the shares, that is insufficient to grant lead plaintiff status since he had not established that he was "attorney in fact for his clients, [or was] granted both unrestricted decision-making authority and the specific right to recover on behalf of his clients.").

Under this line of cases, the Investment Advisors' motion must fail.

POINT II

THE PRESUMPTION IN FAVOR OF THE INVESTMENT ADVISORS IS REBUTTED FOR SEVERAL REASONS

Even assuming, ***arguendo***, that the Investment Advisors have standing to sue, their motion nonetheless fails.

A. The PSLRA's Three-Step Process Governs The Selection of Lead Plaintiff

The Private Securities Litigation Reform Act (the "Reform Act" or "PSLRA"), 15 U.S.C. § 78u-4, *et seq.*, governs resolution of the pending lead plaintiff motions. It "instructs district courts to select as lead plaintiff the one most capable of adequately representing the interests of class members." *In re Cavanaugh*, 306 F.3d 726, 730 (9th Cir. 2002). The Reform Act goes on to create a presumption that the most capable movant is:

> The person or group that -
>
> (aa) has either filed the complaint or made a motion to response to [the statutorily mandated] notice …;
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iiii)(I). This presumption "may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff – (aa) will not fairly and adequately protect the interests of the class; or (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. § 78u-4(a)(3)(B)(ii)(II).

As the Ninth Circuit observed in *In re Cavanaugh*, "[t]he Reform Act provides a simple three-step process for identifying the lead plaintiff pursuant to these criteria." 306 F.3d at 729.

The first step involves verifying that the lead plaintiff candidates filed their motions within sixty-days of the publication of the notice of pendency of the action mandated by 15 U.S.C. § 78u-4(a)(3)(A). In step two, the district court must "consider the losses allegedly suffered by the various plaintiffs before selecting as the 'presumptively most adequate plaintiff – and hence the presumptive lead plaintiff – the one who has the largest financial interest in the relief sought by the class and otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." The third step of the process is "to give other plaintiffs an opportunity to rebut the presumptive lead plaintiff's showing that it satisfies Rule 23's typicality and adequacy requirements." *In re Cavanaugh*, 306 F.3d. at 730.

Applying this three-step process to the pending motions, it is clear that both movants timely-filed their motions for lead plaintiff in that the motions were filed within sixty days after the first-published notice of pendency.[2] In terms of the stated financial interests of the movants, they are as follows:

- Investment Advisors: $7.5 million
- Carpenters Funds: $252,783.00

Based upon the foregoing, the Investment Advisors may be said to be the presumptive lead plaintiff. However, as explained below, the presumption in their favor is rebutted for several reasons.

[2] The notice was published on November 27, 2007. *See* Declaration of Andy Sohrn dated January 28, 2007, Ex. A. The instant motions were both filed within sixty days later, on January 28, 2007.

B. The Investment Advisors Are Not Authorized to Sue

The Investment Advisors rely on the Certification of Roy Behren dated January 16, 2008 (the "Behren Certification")[3] in support of their motion. The Behren Certification states that Westchester is the investment advisor to The Merger Fund and The Merger Fund VL, and that Green & Smith is the investment advisor to the GS Master Trust, MSS Merger Arbitrage 2 and the Institutional Benchmarks Series (Master Feeder) Limited (collectively, the "Hedge Funds").

Nevertheless, no information whatsoever is provided explaining what the Hedge Funds are, their legal structure, who owns them, etc. A review of pertinent SEC filings reveals the following:

> The Merger Fund is an open-end investment company organized as a trust under the laws of the State of Massachusetts.(Merger Fund Registration Statement, filed with the SEC on February 20, 2007, a copy of which is annexed to the accompanying Declaration of Andy Sohrn, dated March 14, 2008 (the "Sohrn Declaration" or "Sohrn Decl.") as Exhibit 1).

> The Merger Fund VL is a Delaware statutory trust whose shares are only available to separate accounts funding variable annuity and variable life insurance contacts issued by participating life insurance companies.(Sohrn Decl. Ex 2: Merger Fund VL Registration Statement, filed with the SEC on April 18, 2007).

> The GS Master Trust is a Master-Feeder structure Bermuda trust consisting of Hudson Valley Partners, LP and The Merger Fund Ltd. (Sohrn Decl. Ex. 3: Green & Smith Uniform Application for Investment Advisor Registration Form ADV, dated March 10, 2006 [the "Green &Smith Form ADV"])[4]

> MSS Merger Arbitrage 2 is a Cayman Islands exempted company. (Sohrn Decl. Ex. 3).

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[3] The Behren Certification is annexed as Exhibit B to the Declaration of Nancy Kaboolian in Support of Westchester and Green & Smith's Motion for Consolidation, Appointment as Lead Plaintiff and Approval of Lead Plaintiff's Selection of Lead Counsel dated January 28, 2008.

[4] This Form ADV registration was terminated on January 22, 2007. As a result, the information contained therein may no longer be accurate.

> Institutional Benchmarks Series (Master Feeder) Limited ("Benchmarks") is a Bermuda limited liability segregated accounts exempted mutual funds company. (Sohrn Decl. Ex. 3).[5]

After alluding to the Hedge Funds by name only, the Behren Certification goes on to state in part – and without explanation – as follows:

> I am the Chief Compliance Officer of Westchester Capital and Green & Smith and am authorized to undertake all acts on their behalves, ***and therefore on behalf of the [Hedge] Funds***, including the right to commence legal action on their behalves and the right to seek to serve as lead plaintiff in an action brought pursuant to the Federal Securities Laws.

(Behren Certification ¶ 12) (emphasis added).

While it may be true that Behren is the Chief Compliance Officer of Westchester and Green & Smith and that he has authority "to undertake all acts on their [*i.e.*, the Investment Advisors'] behalves," it takes an enormous leap of faith to reach the conclusion that he (Behren) is authorized to undertake all acts ***on behalf of the Hedge Funds***.

It is hornbook law that in order for a person to properly exercise a prospective right that does not belong to him, there must be a valid assignment of that right. *See, e.g., Street Search Partners, L.P. v. Ricon Int'l, L.L.C.,* No. 04C-09-191-PLA, 2006 Del. Super. LEXIS 200, at *12 (Del. Super. May 12, 2006) (assignment of claim from plaintiff to entity that invested in plaintiff's management company invalid since assignee had no legal interest in instant issues); *Luna Preservation Society v. Metro. Dist. Commc'n*, Civ. No. 95-0901-T2, 2000 Mass. Super. LEXIS 87, at *22 (Mass. Super. Feb. 28, 2000) (since there was no valid assignment of rights from injured party to plaintiff until the end of March 1995, plaintiff had no action for any damages that may have occurred prior to that date); *see also, e.g., Kenrich Corp. v. Miller,* 256 F. Supp. 15 (E.D. Pa. 1966), *aff'd*, 377 F.2d 312 (3d Cir. 1967) (applying Delaware law) (if an

[5] Hereinafter, Benchmarks, MSS Merger Arbitrage 2 and GS Master Trust shall be collectively referred to as the "Off-Shore Hedge Funds."

assignment of a right to bring an action was not good, for example, for being champertous, the transferee has not gained a substantive right to bring the action and it will be dismissed). Here, Behren claims that he is authorized to act on behalf of the Hedge Funds ***because he purportedly is authorized by the Investment Advisors to act on their behalf*** (his certification states that he is authorized by the Investment Advisors to under take all acts on their behalves "***and therefore on behalf of the funds***"). (Behren Certification) (emphasis added). However, what little information there is in the public domain concerning the Hedge Funds leads to the opposite conclusion.

For example, the Amended and Restated Declaration of Trust of The Merger Fund dated August 22, 1989 (the "Merger Fund Declaration of Trust") (Sohrn Decl. Ex. 4), states, that "[t]he Trustees shall have exclusive and absolute control over the Trust property and over the business of the Trust to the same extent as if the Trustees were the sole owner of the Trust Property and business in their own right…" (Sohrn Decl. Ex. 4, at § 2.1). And while the trustees are given the power to delegate their authority to third parties, there is absolutely no indication whatsoever in any of the documents in the public domain that the trustees ever gave the authority to sue on behalf of the trust to Westchester. Instead the Investment Advisory Contract between The Merger Fund and Westchester (Sohrn Decl. Ex. 5) gives only limited powers to Westchester. These powers focus exclusively on "which securities shall be purchased for [The Merger Fund], which portfolio securities shall be held or sold by [The Merger Fund], and what portion of [The Merger Fund's] assets shall be held uninvested." (Sohrn Decl. Ex. 5, at ¶ 2).

Similarly, the Agreement and Declaration of Trust of The Merger Fund VL dated November 22, 2002 (Sohrn Decl. Ex. 6), provides that "the business of the Trust shall be managed by the Board of Trustees, and such Board shall have all powers necessary or convenient to carry out that responsibility." (Sohrn Decl. Ex. 6, § 3). Once again, there is absolutely no indication whatsoever in any of the documents in the public domain that the trustees of The Merger Fund VL delegated the authority to sue on behalf of the trust to Westchester. Moreover, just like the Investment Advisory Contract between The Merger Fund and Westchester, the contact between The Merger Fund VL and Westchester merely grants the power "to render investment advice and management services with respect to the assets of the Fund…" (*Id.*, ¶ 1). It does ***not*** purport to grant Westchester the power to sue or to serve as a lead plaintiff and representative party on behalf of the Merger Fund VL.

On April 16, 2003, the trustees of The Merger Fund VL granted a ***limited*** power of attorney to Frederick W. Green ("Green") "to execute and to file [certain documents] relating to the initial registration of the Fund as an investment Company under the Investment Company Act of 1940…" (Sohrn Decl. Ex. 7). However, this limited power of attorney clearly by its own terms did not purport to give Westchester the power to sue on behalf of the Fund. *See, e.g.*, *Cusano v. Klein*, 280 F. Supp. 2d 1035, 1041 (C.D. Cal. 2003) ("Like other written instruments, however, a power of attorney should be construed according to the plain and reasonable meaning of its words, and neither restricted nor enlarged"). Indeed, if Westchester was authorized by the trustees of The Merger Fund VL by some broad, all-encompassing delegation of authority, why then would the trustees even need to delegate the power to execute and file the registration documents to Green? Such an authorization would have been superfluous. The answer: because no such authorization exists. As a result, there is no basis whatsoever to conclude that the

Investment Advisors were given the authority to sue on behalf of the Hedge Funds in this or any other case.[6]

C. The Hedge Funds Are Atypical And Subject To Unique Defenses

The Merger Fund's Registration Statement states that the Fund's investment goal "seeks to achieve capital growth by engaging in merger arbitrage." (Sohrn Decl. Ex.1, at 1). The Merger Fund Registration Statement goes on to explain that merger arbitrage "is a highly specialized investment approach generally designed to profit from the successful completion of proposed mergers, takeovers, tender offers, leveraged buyouts, spin-offs, liquidations and other types of corporate reorganizations." (*Id.*, at 5). The Registration also points out that the risk associated with this highly specialized investment approach is "in some cases different from the risks ordinarily associated with investments in equity securities." (*Id.*) Finally, the Registration explains that The Merger Fund "may employ various hedging techniques, such as short selling and the selective use of put and call options" in connection with its investments.

Similarly, The Merger Fund VL's Registration Statement states that the Fund's investment objective is also "to achieve capital growth by engaging a merger arbitrage." (Sohrn Decl. Ex. 2, at 1). The Merger Fund VL Registration contains the same further descriptions as set forth above. (*Id.*, at 5-8).

In this case, it is clear that the Hedge Funds used a merger arbitrage strategy when they purchased their Leap shares. The Behren Certification states that on September 4, 2007, the

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[6] In *Kaplan v. Gelford*, 240 F.R.D. 88 (S.D.N.Y. 2007), Judge Buchwald reached the opposite conclusion. However, she did so based upon an apparent misreading of the Power of Attorney, which she described as a document which "designated Frederick W. Green, the President of Westchester Capital, as attorney-in-fact and agent" – without noting that the document was strictly limited in scope on its face – as well as an incomplete record, characterizing the attempt to rebut the presumption in that case as "inconclusive at best." *Id.*, at 96.

Hedge Funds collectively purchased 110,000 shares of Leap stock, and on September 7, they purchased an additional 135,000 shares.[7]

Thus, over a period of just five trading days in the first two weeks of September 2007, the Hedge Funds purchased over 425,000 shares of Leap. These transactions were obviously triggered by Metro PCS Communications, Inc.'s ("Metro PCS"), September 4, 2007 announcement of its intention to acquire Leap in a stock-for-stock tax-free merger (this buy-out proposal is alluded to in the underlying Class Action Complaint, ¶¶ 64-68, filed November 26, 2007).

When, on September 16, 2007, Leap announced that it had determined that the Metro PCS proposal "[was] not in the best interests of Leap and its shareholders," the Hedge Funds immediately began to dump their shares. (*See* Behren Certification). In fact, at least sixty-two percent of the Hedge Funds' entire Leap holdings were sold between September 16, 2007 and the close of the putative class period approximately two months later, with the remainder of the shares being sold off shortly thereafter. *Id.*[8]

The putative class period in this case is approximately thirty-four months long,[9] ***yet the Hedge Funds purchased all of their Leap shares in just five trading days during a two week period approximately two months before the end of that class period***. This fact, coupled with the unique and highly-specialized trading strategy employed by the Hedge Funds, renders them atypical and subject to unique defenses. *See, e.g., Smajlaj v. Brocade Commc'ns Sys., Inc.*, Civ.

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[7] In addition, the Behren Certification states that The Merger Fund purchased an additional 100,000 shares on September 6; 50,000 shares on September 11; and 30,000 shares on September 13, 2007.

[8] Under *Ruland v. Infosonics Corp.*, Civ. No. 06-1231, 2006 U.S. Dist. LEXIS 79144, at *13-14 (S.D.Cal. Oct. 23, 2006), the class period sales should be excluded from the Investment Advisors' financial interest calculations.

[9] Four different class periods have been alleged in the underlying cases. The longest class period extends from January 7, 2005 through November 9, 2007 (the "Class Period").

No. 05-2042 (N.D. Cal. Jan. 12, 2006) (Sohrn Decl. Ex. 8) (rejecting investment advisor to hedge funds as lead plaintiff because of complex structure, concerns regarding authority and off-shore status of entities; "[i]n sum, there are too many questions surrounding [the advisor's] standing, authority, transparency and structure that may give rise to unique defenses and are atypical of the class as a whole"); *In re Microstrategy, Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 439 (E.D. Va. 2000) (rejecting Wolverine Trading, an options trader, as lead plaintiff despite larger loss on grounds that Wolverine "was an atypical investor that engages in transactions far beyond the scope of what a typical investor contemplates, and recognizing that Wolverine "may have been subject to unique defenses based on its method of doing business…."); *Camden Asset Mgmt. v. Sunbeam Corp.*, Civ. No. 99-8275, 2001 U.S. Dist. LEXIS 11022, *46-47 (S.D. Fla. July 3, 2001) (refusing to certify a class of bondholders on various grounds, including the fact that several of the proposed class representatives "employed a hedge or convertible arbitrage strategy" when purchasing the securities at issue); *In re Bank One Shareholders*, 96 F. Supp. 2d at 784 (rejecting Thales Fund Management as lead plaintiff in part because it employed a unique trading strategy which involved shorting stock and then buying to cover the short position).

D. The Behren Certification Is Deficient On Its Face

The Reform Act requires that "[e]ach plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification…that…states that ***the plaintiff*** is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary…[and] set forth all of the transactions of the plaintiff in the security that is the subject of the complaint…." 15 U.S.C. § 78u-4(a)(2)(A)(iii) (emphasis added). In this case, the Behren Certification is deficient for several reasons:

First, the Investment Advisors failed to represent to the Court that they will testify on behalf of the class in this case. While ¶ 5 of the Behren Certification states that *he* (Behren) will so testify, the PSLRA does not allow a party to make a limited designation. The Reform Act requires a party seeking to serve as lead plaintiff to unequivocally offer its testimony. 15 U.S.C. § 78u-4(a)(2)(A)(iii). Despite this clear and strict mandate, the Investment Advisors have chosen instead to make a limited proffer of Behren's testimony only. This is unacceptable. *See, e.g.*, *Smajlaj*, Civ. No. 05-2042, slip op. at 4 ("The Court, in appointing a Lead Plaintiff, acts as the gatekeeper for absent class members. In that role, the Court must ensure that this action will be litigated as effectively and efficiently as possible and that there will be as few procedural or tangential impediments as possible"); *In re Terayon Commc'ns. Sys., Sec. Litig.*, Civ. No. 00-1967, 2004 U.S. Dist. LEXIS 3131, at *20-25 (N.D. Cal. Feb. 23, 2004) (as part of its continuing "duty to monitor whether lead plaintiffs are capable of adequately protecting the interests of the class members," court disqualified lead plaintiff after facts surfaced indicating that certification was inaccurate); *In re NYSE Specialists Sec. Litig.*, 240 F.R.D. 128, 137-38 (S.D.N.Y. 2007) (after appointment of lead plaintiff, contradictory statements arose concerning the true purchasers of shares in question, leading court to disqualify lead plaintiff).

Second, portions of the trading data listed on the schedule attached to the Behren Certification are missing. While this may have been innocent mistake, courts have strictly applied the statutory, sixty-day deadline imposed by the Reform Act to preclude supplementation of a certification. *See Singer v. Nicor, Inc.*, Civ. No. 02-5168, slip op. at 6 (N.D. Ill. Oct. 16, 2002) (refusing to allow movant to modify amount of financial loss to correct for arithmetic error in contravention of PSLRA's strict certification requirements) (citing *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 818-19 (N.D. Ohio 1999) (Sohrn Decl. Ex. 9)).

Third, the Investment Advisors' purported financial interest in the relief sought by the class is grossly overstated. This overstatement is attributable to two factors: the improper inclusion of "in-and-out" transactions, and the omission of related short sales of Metro PCS common stock.

As noted previously, approximately sixty-two percent of the Leap shares purchased by the Investment Advisors were sold during the Class Period. Under the rationale of this Court's decision in *Infosonics*, the losses attributable to those shares should be excluded from the calculations. *See, e.g., Infosonics*, 2006 U.S. Dist. LEXIS 79144, at *13-14; *see also, In re Comverse Technology, Inc., Sec. Litig.*, Civ. No. 06-1875, 2007 U.S. Dist. LEXIS 14878 (E.D.N.Y. Mar. 2, 2007).

In addition, the Investment Advisors' clients are merger arbitrageurs. When a proposed merger transaction involves a stock-for-stock exchange, merger arbitrageurs typically purchase the target company's stock "and, at approximately the same time, an equivalent amount of the acquiring company's shares may be sold short." (Sohrn Decl. Ex. 1, at 6). Thus, there are two sides to a merger arbitrageur's transaction: a purchase and a sale.

Here, the Behren Certification lists only one side of the Hedge Funds' transactions: the purchases of Leap shares. However, in the stock-for-stock deal, like that proposed by Metro PCS, according to their own statements, the Funds would have simultaneously engaged in a short sale of Metro PCS stock. Assuming the Funds followed their stated "fundamental policy which may not be changed without shareholder approval" (Sohrn Decl. Ex. 1, at 5) and did so, their financial interest in the relief sought by the class is substantially less than what has been represented to the Court.[10]

[10] This is because Metro PCS's stock price steadily declined after the announcement of the deal.

While the term "financial interest" is not defined in the Reform Act, the Ninth Circuit has observed that district courts "may select accounting methods that are both rational and consistently applied" in order to determine a party's financial interest. *In re Cavanaugh*, 306 F.3d at 730, n. 4. It is eminently rational for the court – in determining the financial interest of a merger arbitrageur – to examine both sides of the arbitrage transaction (*i.e.*, the purchase long and the sale short) in order to calculate the arbitrageur's true financial interest.

Finally, the Off-Shore Hedge Funds are based in the Caribbean, raising yet another layer of unnecessary complexity for the class to grapple with. *See, e.g., In re Network Assoc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1030 (N.D. Cal. 1999) (refusing to appoint two foreign financial institutions as unlikely to "manage and control American lawyers conducting litigation in California").

Taking these items together, they render the Investment Advisors inadequate. *See, e.g., Smajlaj*, Civ. No. 05-2042, slip op. at 5. (Sohrn Decl. Ex. 8).

CONCLUSION

For the forgoing reasons, the Investment Advisors' motion for appointment of lead plaintiff and approval of lead counsel should be denied. Instead, it is respectfully submitted that the New Jersey Carpenters Pension and Benefit Funds should be appointed lead plaintiff, and their choice of counsel should be approved.

Dated: March 14, 2008

Respectfully Submitted,

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By: /s/Andy Sohrn
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

HCL PARTNERS LIMITED PARTNERSHIP, On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. LEAP WIRELESS INTERNATIONAL, INC. S. DOUGLAS HUTCHESON, DEAN M. LUVISA, AMIN I. KHALIFA and PRICEWATERHOUSECOOPERS, LLP, Defendants.	**ECF CASE** **No. 07-CV-2245-BTM-NLS** Hon. Moskowitz Date: March 28, 2008 Time: 11:00 a.m. Courtroom: 15 **Per Chambers No Oral Argument Unless Requested by the Court**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing:

1. The New Jersey Carpenters Pension And Benefit Funds' Memorandum Of Law In Opposition To The Motion Of Westchester Capital Management And Green & Smith Investment Management For Appointment Of Lead Plaintiff And Approval Of Lead Counsel;
2. Declaration Of Andy Sohrn In Opposition To The Motion Of Westchester Capital Management And Green & Smith Investment Management For Appointment Of Lead Plaintiff And Approval Of Lead Counsel

On this date, 14 of March, 2008 was served upon all counsel of record by electronically filing with the Clerk of the Court and all attorneys of record via notification through the Southern District Court's of California's ECF system; and those not so registered by ECF by placing a copy the same in the United States Mail, postage prepaid, and sent to their last know address as follows:

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Los Angeles, CA this 14 day of March, 2008

/s/ Andy Sohrn

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